

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

ALICE H. ALLEN, ET AL

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VS

)

CASE NO: 5:09-CV-230

DAIRY FARMERS OF AMERICA, INC,))
DAIRY MARKETING SERVICES,
LLC, DEAN FOODS COMPANY AND)
HP HOOD, LLC

)

FINAL FAIRNESS HEARING

BEFORE: HONORABLE CHRISTINA REISS
CHIEF JUDGE

APPEARANCES: KIT A. PIERSON, ESQUIRE
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Representing The Plaintiffs

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Representing The Plaintiffs

(APPEARANCES CONTINUED:)

DATE: July 18, 2011

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1 (The Court opened at 9:20 a.m.)

2 THE CLERK: Your Honor, the matter before the
3 Court is civil case number 09-230, Alice Allen, et al versus
4 Dairy Farmers of America, Incorporated, et al. The
5 plaintiffs are present through Attorneys Andrew Manitsky and
6 Kit Pierson. The defendants are present through attorneys
7 W. Todd Miller, Kevin Hardy, John Sartore and Paul Friedman.
8 The matter before the Court is a Final Fairness Hearing.

9 THE COURT: Good morning.

10 MR. FRIEDMAN: Good morning, Your Honor.

11 MR. PIERSON: Good morning, Your Honor.

12 MR. MILLER: Good morning, Your Honor.

13 MR. HARDY: Good morning, Your Honor.

14 MR. MANITSKY: Good morning, Your Honor.

15 MR. SARTORE: Good morning, Your Honor.

16 THE COURT: My understanding, based on the filing,
17 I believe from Sunday night, is that you are not going
18 forward on the class certification hearing today. I granted
19 that unopposed motion and I will talk to you at the end of
20 this hearing about rescheduling.

21 I'm sorry for whatever medical unfortunate event
22 caused that to happen, but it's good that you could all
23 reach an agreement on that.

24 With regard to today's hearing you know that we're
25 here to discuss the Dean settlement and in terms of whether

1 it is fair, reasonable and adequate and whether the Court
2 should grant a final approval. As usual I have some
3 questions that I would like answered. I have read what you
4 have filed. I have received the Vermont Attorney General's
5 most recent filing, I would call it a corrective letter, and
6 have read that.

7 The order I would like to proceed in is I want to
8 hear from any individuals who came who want to speak about
9 the settlement. And then I would hear arguments from
10 counsel for Dean, for the plaintiff. I have ruled that the
11 defendants do not have standing to object to the settlement
12 as revised. If anybody wants to call any witnesses I'll ask
13 that you bring that to my attention.

14 A couple of the questions I had in looking over
15 what you have filed was whether or not the class, or
16 proposed class I should say, was advised of the change of
17 location to Rutland. I did notice that it was Elmwood
18 Avenue, Burlington with a notice to go to the website for a
19 change in location. And obviously we're here in Rutland.
20 So I want to make sure that people were re-directed here if
21 necessary.

22 I looked at the number of notices that were
23 returned and saw the process by which they were sent out
24 again. I'm not so sure I'm very clear to the final tally of
25 how many notices did not reach prospective class members.

1 With regard to incentive awards for class
2 representatives that was not something that I granted
3 preliminary approval. And I don't recall that coming into
4 the class notice. I looked for it this morning again. I'm
5 not so sure that the class got notice of that. And so I
6 want you to address whether they got notice, what the form
7 was and, and whether or not it would be fair to add that
8 into the settlement at this time in the event notice was not
9 given.

10 So those were some of the questions I had. And
11 let me start with asking if there are any individuals here,
12 we had at least one written request who wished to speak with
13 regard to the issue of the settlement. Yes?

14 MR. GORTON: Yes, Your Honor. My name is Grant
15 John Gorton. I submitted the written request.

16 THE COURT: Does either counsel for Dean or for
17 the plaintiffs have any objection to taking Mr. Gortman
18 first?

19 MR. PIERSON: Excuse me, Your Honor, I'm sorry?

20 THE COURT: Do you have any objection to taking
21 Mr. Gortman first?

22 MR. PIERSON: No, not at all.

23 MR. FRIEDMAN: No, Your Honor.

24 THE COURT: Is anybody asking that Mr. Gortman be
25 sworn in? We typically don't do it in this, we just allow

1 you to voice your opinion. You do it right from the podium.
2 And any request for that from counsel?

3 MR. FRIEDMAN: No, Your Honor.

4 MR. PIERSON: No, Your Honor.

5 MR. GORTON: Your Honor, I requested to speak
6 because although I have accepted the settlement I have
7 several very strong concerns.

8 One of the first concerns is the fact that my
9 acceptance of the settlement would be considered approval of
10 what has happened. I've accepted the settlement only
11 because it was the best alternative. The only other
12 alternative was to continue litigation of my biggest and
13 most important and most critical client and customer against
14 me, a litigation which I did not want to happen in the first
15 place.

16 The reason I didn't want that litigation to happen
17 is because what's most important to me is to have a
18 long-term relationship with this customer.

19 THE COURT: Are you talking about Dean?

20 MR. GORTON: Dean Foods.

21 THE COURT: Dean, okay.

22 MR. GORTON: Yes, Dean Foods. To put long-term
23 relationship in perspective I have been married for 40
24 years, I live in a house that was built in the 1850's, I
25 milk in a barn that was built in the 1850's. I have four

1 neighbors who are farmers. They've been friends and
2 neighbors for 30 years spanning at least three generations.
3 I worship in a church that I attended as a toddler and have
4 many friends in the community whose friendships spans as
5 many as five generations. That's long-term relationship to
6 me.

7 I've been farming for 30 years. I expect my son,
8 whose farming with me now, to farm for another 40 years.
9 And it's important to him to have a long-term relationship
10 with Dean Foods.

11 And my understanding of long-term relationship and
12 the potential damage that this lawsuit comes to long-term
13 relationships is based on my non-farm experience. I'm a
14 program manager. I have almost 20 years of experience as a
15 program manager and working in business development for
16 Defense Department contractors. I'm a 1971 graduate of the
17 Naval Academy, spent nine years on active duty in the
18 military, 12 years in the Reserves.

19 And my business in the program management for
20 multi-million dollar government contracts and business
21 development with both national and international customers
22 has given me a very strong understanding of what business,
23 how business relationships are developed, how important they
24 are and what kind of damage can be done.

25 Dean Foods is a for profit company. Clearly, the

1 cost of milk is one of their most -- probably their biggest
2 if not the biggest expense that they incur. So clearly it's
3 in their business interests to buy milk at the lowest price
4 that they can buy milk.

5 Dairy farmers, our most important income, our
6 biggest income in fact is the price of milk. So Dean Foods
7 wants to buy milk at a price that's maybe way down here if
8 you would ask them. Dairy farmers want to get a price of
9 milk that's way up here. And there has to be some agreement
10 reached that is sustainable.

11 Dean Foods needs dairy farmers just as badly as we
12 need Dean Foods. Without dairy farmers they don't have any
13 milk to process. And what makes this problem worse is there
14 is no definitive answer for what price should be a fair
15 price.

16 I spent about four hours on the phone with
17 Mr. Benjamin Brown of Cohen-Milstein. And his response was,
18 well, this lawsuit, the effects of this lawsuit will not
19 affect the business relationship between dairy farmers, it
20 will not affect the price of milk that Dean -- the price
21 that Dean Foods might be willing to pay for milk. And I
22 could agree with that if there was some way to say Dean
23 Foods and dairy farmers could say, okay, \$22.10 is the price
24 of milk, it's the least price that we can pay and it's the
25 price that's going to satisfy farmers so that's what we'll

1 pay and that number wouldn't necessarily change if there
2 were issues or as a result of the business relationship.
3 But that doesn't occur. There is no -- there is no price
4 discovery mechanism that allows either dairy farmers or Dean
5 Foods to accurately determine that price of milk in between
6 what they want to pay and what dairy farmers want to
7 receive.

8 So it's a negotiated price, a negotiated price
9 based on also, not just price, but quality and service. And
10 as a negotiation the resulting price that comes out of that
11 negotiation has, the business relationship has an important
12 effect, potential effect on that price; an effect that far
13 outweighs any benefit that dairy farmers will receive from
14 this settlement.

15 One way that people might say, well, to determine
16 the -- to determine a price discovery mechanism would be to
17 have the purchase of independent milk supplies. And the
18 problem with that is it represents a price discovery
19 mechanism but it represents an inaccurate price discovery
20 mechanism because it does not accurately reflect the true
21 cost of bringing milk to the market.

22 The fact that one individual farmer, who might
23 live only a few miles say from a Dean plant, and lives on a
24 main road, and is a large farmer, and could ship a lot of
25 milk very easily to a Dean plant, therefore, Dean could pay

1 him less, he could get more money does not adequately
2 reflect the cost of serving the market in the northeast.

3 Every day a thousand, probably something on the
4 order of a couple thousand milk trucks travel to five or six
5 thousand or eight thousand farms, pick up milk and deliver
6 that milk to something on the order of I think it's a, over
7 a hundred plants.

8 The cost of doing that and making sure that each
9 plant gets as much milk as they want and that all the
10 farmers who produce milk have their milk picked up and
11 delivered to a plant, which it has to be, is called
12 balancing. In addition to balancing costs there are other,
13 there are other associated costs besides, besides balancing.
14 You have issues of Legislative action, you have issues of
15 regulatory action, you have product development and you have
16 marketing. And all of those are expenses which represent
17 the common good of the industry. If there's Legislative
18 action that could seriously impact dairy farmers that needs
19 to be addressed. If there are regulatory issues such as
20 clean water, clean air, those issues have to be addressed
21 and it costs money to do that.

22 And so though all of those costs come in between
23 the cost that Dean Foods pays for milk and the cost that
24 dairy farmers receive. And if all farmers share in that
25 cost all farmers share in the benefit so all farmers should

1 be sharing in all of those costs equally. And that's very
2 difficult to do.

3 The other problem that we have very seriously is
4 that in our industry what's good for any single one of us as
5 an individual is bad for the common good. What's good for
6 every single dairy farmer is to produce as much milk as that
7 dairy farmer can produce. When we all do that it produces
8 too much milk. Also what's good for the industry is to make
9 sure every customer, not just Dean Foods, but every customer
10 we have receives as much milk as they need for their plant
11 because the end goal is to ensure that every one of us as a
12 consumer whenever you want to walk into any store anywhere
13 and buy any dairy product, milk, cheese, butter, whatever,
14 that product is available in the store for you to buy.

15 And in order for me to do that, in order for me to
16 make sure my customers and my customers move enough food,
17 enough milk to get dairy products to consumers I basically
18 have to over produce. There is no way that I can figure out
19 exactly how much milk needs to be produced every day,
20 exactly how much milk needs to go to consumers.

21 The trouble is the current system as soon as I
22 over produce milk or the industry over produces milk the
23 current policy of pricing in the current pricing mechanisms
24 force my price of my milk down.

25 If you put the current mechanism for pricing milk

1 into an Excel spreadsheet you would get what Excel calls a
2 circular reference error. It would not allow you to put the
3 formula in the spreadsheet.

4 It is an undamped positive feedback system. And
5 in addition to my business, my development and my technical
6 expertise in the Department of the Defense is in the area of
7 controls and monitoring. And a undamped positive feedback
8 system is the most unstable control system that you can
9 possibly devise.

10 What we really truly need is a system that will
11 allow me, allow dairy farmers to receive a fair price, a
12 price that's fair to consumers, a price that's fair to the
13 people in the, in the middle, the processors and the
14 retailers in the middle. That's what we -- that's what we
15 really truly need. And then the excess milk that's produced
16 could be used to help those in need.

17 I, if I could get a fair price for 95 percent of
18 the milk that I produce I could afford to give away five
19 percent of the milk I produce to help those in need. When
20 producing that 100 percent of my milk drives my price down
21 to an unacceptable price, a price that's below cost of
22 production, I can't help other people.

23 So each one of us and this is, this issue of doing
24 something for yourself as opposed to doing something for the
25 common good that's not just for dairy farmers. Every single

1 one of us every day we get up and have to ask ourselves how
2 much today do we do that helps us and our families versus
3 how much we do that helps the common good or helps those in
4 need. And that can be a very difficult -- it can be a very
5 difficult position when doing things to help the common good
6 hurts you because every single one of us, we have to take
7 care of ourselves, we have to take care of our families, we
8 have to take care of our businesses, whatever it is that we
9 do.

10 And so my problem with this lawsuit and my problem
11 with this settlement is that it does nothing to help me
12 solve the real issues that my industry faces. And, in fact,
13 it exacerbates those problems and promotes the potential for
14 those problems to increase and those problems to reduce my
15 price of milk. And that's why I do not support a 33 and a
16 third percent fee to the lawyers.

17 Basically the lawyers are asking for this. I
18 would like to pay them this. And you kind of get -- in this
19 case you get to decide what's in the middle. And we
20 certainly will abide by your decision. And if that's not a
21 politically correct statement I don't know what is. But I
22 don't envy your job, Your Honor. Thank you.

23 THE COURT: Well, thank you. It's obvious to me
24 that you gave that a lot of thought. And I'm glad you came
25 here to tell us your thoughts. And I'm going to ask counsel

1 to address some of those comments in your presentation.

2 MR. GORTON: You want me to stay here?

3 THE COURT: No, you are free to sit down.

4 Anybody else who wanted to speak including any
5 attorney generals for order number one, including our amicus
6 curie Vermont Attorney General?

7 All right. We will start with plaintiffs. And
8 Mr. Pierson I didn't know or Mr. Manitsky if you are going
9 to call witnesses or if you're going to make an oral
10 presentation. You've obviously filed a lot of documents.

11 MR. PIERSON: Thank you, Your Honor. We're simply
12 inclined to make an oral presentation. It's my
13 understanding from conversations -- I think -- I think
14 that's how all parties are proceeding.

15 THE COURT: All right. And in addition, let me
16 know what, if anything, I know Dean Foods gave notice of
17 this, the preliminary approval and the proposed settlement
18 to all of the attorney generals in order number one. We
19 have only heard from the Vermont Attorney General. Please
20 confirm for me that that is all that we've heard from.
21 Mr. Friedman?

22 MR. FRIEDMAN: That's correct, Your Honor.

23 THE COURT: All right.

24 MR. FRIEDMAN: Correct.

25 MR. PIERSON: Correct, Your Honor. We have spoken

1 to some other attorney general's offices, but we have not
2 received any objections.

3 THE COURT: All right. Mr. Pierson?

4 MR. PIERSON: Good to see you, Your Honor. It's
5 nice to be here in Rutland.

6 THE COURT: Yes.

7 MR. PIERSON: I think the last time I was here was
8 some 20 years ago when I was here with a bicycle. And it's
9 a wonderful area to bicycle in.

10 Before I start I would just like to make a couple
11 introductions, if I may. Perhaps and most importantly I
12 would like to introduce the Sitts, the two Sitts plaintiffs.

13 THE COURT: Good morning.

14 MR. PIERSON: Ralph and Garret. I also have with
15 me Mr. Manitsky, who you know. And I should mention
16 Mr. Commins who is here from the Baker-Hostetler firm.

17 THE COURT: Good morning.

18 MR. PIERSON: Mr. Cummins is here.

19 THE COURT: One of your clients has his hand up.

20 MR. SITTS: There's something I would like to
21 address the Court.

22 THE COURT: At some point certainly. Absolutely.

23
24 MR. PIERSON: First, I guess I would like to -- I
25 will comment on Mr. Gorton's comments during the course of

1 my presentation. I would like to thank him for being here.
2 He's obviously an articulate and, frankly, impressive
3 gentleman. And his comments were well considered and
4 thought out.

5 I would comment at the outset that I think the
6 Court should know, to get some sense of the process, my
7 partner, Mr. Brown, did actually spend several hours on the
8 phone over the course of three conversations with
9 Mr. Gorton. And I don't recall if those conversations were
10 initiated by Mr. Brown or Mr. Gorton. But they spent a lot
11 of time talking.

12 And the point of those, as you no doubt gather
13 from Mr. Gorton's comments, he's got strong opinions. And
14 they are, they are not opinions that were lightly reached.
15 He's an impressive guy. And the point of our conversations
16 with him was not to persuade him that he was wrong, but it
17 was to hear his perspective and to try to understand his
18 perspective and to help him understand our perspective. So
19 I just want the Court to know we took that very seriously.
20 And even though he obviously disagrees with us in some
21 respects I'm glad he's here today.

22 With regard to the preliminary approval I'm
23 getting actually answers to some of the Court's questions,
24 but I'll try to answer those in the context of my remarks.
25 I'll be, I'll try to be relatively succinct here. As you

1 know on May 4, 2011 you granted preliminary approval of the
2 Dean settlement. Since that time, in my view, nothing has
3 happened that changes my view of the settlement or I think
4 should change the Court's view of whether final approval is
5 appropriate.

6 Notice was sent to more than nine thousand
7 farmers. Notice was also published in agricultural
8 publications directed to the farming community consistent
9 with the Court's order. And information about the case has
10 also been published on the website for the claims
11 administrator.

12 To answer one of your questions of the nine
13 thousand notices 201 were returned, the claims -- because of
14 incorrect addresses. My understanding is that 10 of those
15 were returned with a follow-up address by the postal service
16 and the notice was then re-mailed to the corrected address.

17 Of the remainder Rust, whose the claims
18 administrator, which is probably, you know, if not the
19 leading claims admin -- they may be the leading claims
20 administrator in the country. It's certainly on a very
21 short list. They were able to locate, through a service
22 they use for locating people, another 149 of the people that
23 did not receive notice. So they've received notice.

24 So in terms of what the identifiable class notice
25 here is actually I think very, very good. Probably, I

1 didn't exactly do the math, but it's probably 98,
2 99 percent. And, of course, the additional notice is
3 provided by the publications and the internet.

4 So I think it is fair to say that we've pretty
5 much done pretty much all you can humanly do with what I
6 would say considerable success.

7 Of the nine thousand notices there were only two
8 objections. There were only four opt outs, which is really
9 extremely low by any measure. And to some extent the Court,
10 when we discussed this a couple months ago the Court, and
11 I'm paraphrasing a little bit, but you essentially made the
12 observation that one of the benefits of the notice process
13 was it provided some reality testing because it's pretty
14 easy for lawyers or parties to gather up people that are
15 going to support their position, but the notice provides a
16 way to sort of test the realities of the situation. And I
17 think the fact that there have been only two objections out
18 of more than nine thousand notices I think it tells you a
19 lot. I think it says a lot. I don't want to overstate what
20 it says, but it's a significant factor in evaluating the
21 settlement. And I think the Second Circuit, the Second
22 Circuit makes that, makes that clear.

23 The one other interesting thing that I'll just
24 comment on briefly that I think the Court should be aware of
25 is since I was last in front of the Court I actually had the

1 opportunity to oppose, to maybe oppose, but certainly depose
2 the head of DMS, Greg Whitcomb. And one of the interesting
3 things in Mr. Whitcomb's deposition was, and I'm
4 paraphrasing him as well, but I think it's a fair
5 paraphrase, he basically said he had no problem with the 30
6 million dollar settlement, that they weren't -- he had never
7 opposed that aspect of it. That um, that that, that that
8 was Dean's business and I thought it was --

9 THE COURT: Well, weren't the defendants up front
10 from the start is that they never weighed in on the monetary
11 portion of the settlement?

12 MR. PIERSON: I don't really -- I disagree with
13 that in one respect, Your Honor. They had argued there was
14 a conflict relating to that and it was this whole argument
15 about counsel can't make a choice between which defendant to
16 settle with. So they had certainly -- I think -- I think it
17 is true, I mean all the affidavits that came in talked about
18 Section 9.2 of the -- none of them complained about the
19 monetary relief. And I'm going to say this -- I'm going to
20 try to answer the Court honestly. And this is not really
21 meant as a criticism of anyone at all. There was sort of a
22 lawyer created argument about a conflict, about the
23 financial position. I think it was a lawyer argument.

24 THE COURT: Well, you opened the door so I will
25 now walk through it. And I took the defendant's argument to

1 be by the sheer virtue of negotiating an injunctive
2 provision that favored, in their opinion, one portion of the
3 class over the other, the class counsel and representatives
4 displayed a conflict of interest which made them ill-suited
5 to represent the whole class. So that's what the argument
6 was.

7 And when the injunctive relief went away in terms
8 of this particular settlement and this class I believe that
9 those arguments are mute. And what happens when we get to
10 class certification I would expect that argument to be
11 resurrected.

12 MR. PIERSON: Yeah, sure. And I actually think --
13 I may have a little bit different -- I don't disagree that
14 they made that argument. What I think they actually argued
15 more than that. I think the lawyers were sort of arguing
16 there was a conflict with regard to the financial component
17 too. But what was -- what was I think significant, and I
18 think Mr. Whitcomb's comments about it are significant, is
19 that when you look at the underlying materials, and the
20 Court picked this up I think very quickly at the last
21 hearing, none of the underlying materials suggested that
22 there was any real opposition to the 30 million dollar
23 settlement. Put aside 9.2. Obviously that was at issue.

24 And all I'm saying about Mr. Whitcomb's testimony,
25 and I don't mean to dwell on it because I don't think it's

1 much of an issue, it was significant to me when I deposed
2 him he sort of reiterated that that was not problematic from
3 his point of view. I don't want to overstate his testimony,
4 but I think -- but I think that's fair.

5 THE COURT: Well, let me, as long as we're talking
6 about the amount of settlement, and I agree that this case
7 is one in which there are very few objections if you
8 compared them against the size of the class, the Vermont
9 Attorney General has raised the issue of the amount of the
10 settlement in comparison to the amount of the settlement in
11 Southeastern Milk. They conceded that they haven't analyzed
12 the strength of the claims. They conceded that that
13 settlement was on the eve of trial and is paid out over four
14 years.

15 I have some at least thoughts of my own about the
16 statute of limitations in that case versus this case, but
17 they have raised that issue about is it enough without
18 saying isn't it enough. So how about addressing some of
19 their comments.

20 MR. PIERSON: Yeah, let me address that, Your
21 Honor. And it's a fair question for them to raise. You
22 know, frankly, if they hadn't raised it I was going to raise
23 it myself. And I wouldn't have raised it as a question, but
24 the Dean settlement in the Southeast I think became -- I
25 think the Court was notified of it Tuesday or Wednesday of

1 last week. So as an officer of the Court I would have
2 discussed it with the Court whether they raised it or not.

3 I think there are a few things to be said about
4 the Vermont A.G.'s letter. First, and without sounding like
5 we invite too many objections, we do -- I'm glad to have
6 them weigh in. I think it's good. It's good for the
7 process. It's good for the Court. So we welcome that. And
8 we've tried to -- I think we have a cooperative relationship
9 with them. I think the defendants have been cooperative
10 with them.

11 One thing that is important, and then I'll kind of
12 get to the merits of the answer of the question, and I want
13 to say that tactfully. They have a very limited
14 understanding -- in fact they have no understanding of what
15 the litigation in the Southeast is about. And that's not a
16 criticism of them because they are not in the Southeast,
17 it's not their jurisdiction. You wouldn't expect them --
18 you wouldn't expect them to, but, you know, the letter sort
19 of reflects that. I mean the first letter they sent was
20 based on the assumption that there was one order at issue.
21 There were, in fact, two orders that are at issue. And I
22 think the relevance of that, and they are frank about this
23 in their letter, the relevance of that is they really have
24 no -- they are really kind of just raising the question.
25 And it's a legitimate question. And I'll answer it.

1 I think a second point that I want to make about
2 their letter, and the Court alludes to it, is it's important
3 to look at what the letter says and what the letter doesn't
4 say. The letter does not object to the settlement. It does
5 not object to the attorney fee. And, of course, and, in
6 fact, they distinguish it from cases. They make a point
7 that they do go into cases where those are problems and, you
8 know, they are not shy about expressing their opinion, and
9 they shouldn't be. And it's quite clear they have not
10 raised an objection here. What they've done is they have,
11 they have raised a question.

12 There's one other assumption in their letter,
13 which I think is, it really requires comment, which is the
14 assumption that the Dean settlement was a, was a
15 pre-discovery settlement. And I do want to say a couple
16 things about that, Your Honor, because it's, you know,
17 frankly, it's important to me and um, and it's important to
18 my team. You know, we were put on a discovery schedule in
19 this case which, with the benefit of it being done, I will
20 now thank the Court for, because it, you know, at the end of
21 the day it serves the litigation well. And we've got issues
22 that should move towards resolution. But I will also tell
23 Your Honor that in almost 30 years of practice this is the
24 toughest schedule I've had in an antitrust case in my career
25 by some measure.

1 And what that -- the relevance of that to the Dean
2 settlement is that by the time the Dean case -- by the time
3 the settlement was negotiated in December we were on the
4 verge of about 50, 60 depositions. And I think the cut off
5 at that point, I don't know if it was the end of January or
6 it was some time in February, but by the time we negotiated
7 the settlement with Dean we had reviewed literally millions
8 of pages of documents that had been produced in the
9 Southeast. You know, a lot of them pertained to the
10 Northeast and had never been reviewed for that purpose.

11 So we had done a massive amount of work, Your
12 Honor. And that it, you know, one thing that has been I
13 think actually highly beneficial about the case, and I give
14 the defense counsel credit for this, I give us some credit
15 for this too, is there's been an enormous amount of work
16 here that has sort of gone on behind the curtain and it's
17 because counsel has been able to litigate this case without
18 flooding Your Honor with motions. And that, that hasn't
19 been as a result -- it certainly hasn't been a result of
20 capitulation from them. It hasn't been like capitulation
21 for us either. It's reflected in, you know, dozens and
22 dozens of hours of trying to negotiate out issues and
23 ultimately compromising and trying to reach middle grounds.
24 But I -- but -- but -- but the important point is that by
25 the time we sat down, and Mr. Friedman and I sat down to see

1 if we could reach a resolution of this we had done -- we had
2 done an extraordinary amount of work.

3 There's one other comment I want to make, Your
4 Honor, and it's sort of a personal comment, but I think it's
5 important because I really want you to understand our
6 perspective of the settlement. And then I'm going to get to
7 the merits of what they have to say.

8 You know, I spent about 25 years of my career on
9 the defense side of these cases, primarily on the defense
10 side of these cases. And um, and it was a great
11 professional experience in a lot of ways, but I realigned
12 myself at the end of that on the plaintiff's side of these
13 cases and it was because, frankly, Your Honor, to be just
14 brutally honest with you, it was because that was where my
15 heart was. That was who I really wanted to be representing.
16 But when I made what was a very fundamental career decision
17 for me one of the concerns I had about the plaintiff's bar,
18 frankly, was that I had seen too many cases where they were
19 too quick to settle and I didn't think it served their
20 clients well.

21 And when I was speaking to my old firm and making
22 a personal decision about making that career choice one of
23 the questions I really wanted talked out and did talk out
24 was that was not the way I litigate cases. I like going to
25 trial. And I think I'm good at it. And I think there are

1 cases where it should be done. And I had made clear to my
2 firm and made a commitment myself that whatever kind of
3 plaintiff's lawyer I was going to be when I was representing
4 victims, people that are really hurt, it was going to be a
5 lawyer that was prepared to take cases to trial. But, but
6 what a good lawyer does, Your Honor, is a good lawyer is
7 prepared to take cases to trial, but a good lawyer also is
8 prepared to settle cases when they should be settled. And
9 that's what happened here.

10 So let me talk for a moment about the merits of
11 their argument and in particular their comments about -- the
12 questions about the Southeast.

13 The first comment I would like to make is that,
14 you know, basically the question they posed is there's -- I
15 mean, and in essence they are saying there's more milk in
16 the northeast than the southeast so why the difference. And
17 the first response I would make is the volume of milk is
18 really not a metric for anything in terms of the strengths
19 or weaknesses of the antitrust cases in these two regions.

20 Let me give you an example. I mean in Order 30,
21 which is the area around Chicago and the midwest, they
22 produce more milk, significantly more milk than they do in
23 the northeast. That tells you nothing about whether there's
24 an antitrust case there. It tells you nothing about the
25 strength of an antitrust case. In fact, it's not -- in

1 fact, it's not even a relevant metric of the strength of the
2 case. So that's kind of my first answer to them is that the
3 question you're posing is really not the relevant question.
4 I mean the relevant question is compare the actual substance
5 of the cases. And that's something they really haven't
6 done. They're simply asking the question.

7 So there are a couple differences that are
8 relevant here. And they certainly were relevant to us. One
9 difference is the difference in the market share. Dean, my
10 understanding, and Mr. Cummins is here and um, who is about
11 to go to trial in the Southeast, so he could answer this in
12 more detail if it's helpful to the Court, Mr. Friedman is
13 obviously familiar with it, but the plaintiff's allegation
14 in the Southeast is that Dean -- DFA also owns a lot of
15 processing plants in the northeast or they owned or
16 controlled. And the allegation is through surrogates like
17 NDH in the Southeast. And that so the market share of
18 defendant owned and controlled, principally by Dean
19 processing plants in the Southeast, is about 75 percent.
20 That's the plaintiff's allegation. They will probably
21 dispute it at trial, but that's an allegation in the
22 Southeast. And that's magnitudes -- orders of magnitude
23 higher than it is in the northeast.

24 Now, we think we got a real case in the northeast.
25 We actually think we have a good case against DFA. But

1 Dean's situation in the two regions is different in a
2 respect that is of significance.

3 THE COURT: And it was one of the issues Dean
4 raised in moving to dismiss, inadequate market share to base
5 a claim.

6 MR. PIERSON: Absolutely. So that's an issue.
7 The second issue, and um, again, I'm happy to go into it in
8 as much detail as the Court wants, but let me give you a
9 high level. There is conduct by Dean at issue in the, in
10 the Southeast that is of less significance in the northeast.
11 For example, I can just give you two examples. I mean, in
12 other words, the conduct is not -- the allegations of
13 wrongdoing by Dean are not the same. Frankly, there are
14 some facts by DFA in the northeast that I think are worse in
15 the northeast than they are in the southeast. But with
16 regard to Dean two examples are there is a big issue down
17 there about the spin off of the certain, of 11 processing
18 plants to NDH. And um, the allegation in the Southeast, as
19 I understand it, is that that was basically done and
20 orchestrated in a way that was designed to circumvent the
21 DOJ -- to allow the DOJ to approve other activity,
22 acquisition activity that were going on down there. But
23 those plants, those plants were located in the southeast.
24 There are some issues relating to NDH in the northeast, but
25 they are relatively modest compared to the issues in the

1 southeast.

2 Another major issue of conduct in the southeast
3 concerns an organization called the Southern Marketing
4 Organization, which is -- it's a little bit like DMS in the
5 south, but it just exists in the south.

6 And the allegation down there is that Dean forced
7 some of the competing co-ops, basically said you want to
8 access Dean you got to go through SMA, which was a DFA
9 controlled entity.

10 So the allegation in the southeast is basically
11 that the DFA and Dean were like that and really had a lock
12 on a very, very substantial portion of that market. And
13 many of those allegations, and some of the sort of crony
14 allegation, the outflow from that, involved facts that are
15 going on in the Southeast --

16 Now, there are other attorneys here that can
17 explain it better than I can, but I think the one point that
18 there's not really a dispute about it is that there is
19 significant conduct that is at issue down there that isn't
20 at issue in the northeast. It's just not -- in that sense
21 it's not an apples to apples comparison.

22 Your Honor alluded to the statute of limitations.
23 And, you know, this is an issue which I have no doubt we're
24 going to have a dialogue about down the road. And it's, as
25 you know, Your Honor's wrestled with it. It's a, it's a

1 complicated issue. I think you'd probably agree with me
2 about that. I've read a lot of the same stuff that you've
3 read and it's a complicated issue. The case law is a little
4 bit muddled. And, and I really think that we're right on
5 the issue. Frankly, I think we're right vis-a-vis Dean, and
6 the Court's earlier ruling let some of -- raised questions
7 about the statute of limitations versus Dean. Said some
8 stuff for the purposes of a motion to dismiss. It could go
9 forward against Dean. It left a little bit up in the air.
10 So we'll have time to argue about it, time to talk about
11 that, but I think it is significant in terms of these two
12 cases. I mean the case in the southeast was brought a
13 couple years earlier. And the defendants have not contended
14 there, as I understand it, and Mr. Friedman will correct me
15 if I'm wrong, but as I understand it the defendants have not
16 disputed that the issue of fraudulent concealment is a fact
17 issue for the jury. So it's not that the statute of
18 limitations issue may not be raised down there, it may or
19 may not. It wasn't raised, as I understand it, it wasn't
20 raised summary judgment motions in the southeast, it wasn't
21 raised on the motion -- I don't believe it was raised on --

22 THE COURT: I believe it was raised on the motion
23 to dismiss.

24 MR. PIERSON: I could be wrong about that, Your
25 Honor. My understanding is that it has been a -- it's a,

1 and Mr. Cummins will correct me if I'm wrong, but I don't
2 believe that the defendants argued in the summary judgment
3 motions in the southeast, and they argued a lot, as you can
4 imagine they argued a lot of things. There was a mountain
5 of motions filed there. I don't believe that they contended
6 that the fraudulent concealment issue could be resolved as a
7 matter of law. I think they implicitly sort of accepted
8 that that was a fact issue for the jury. But it's -- but
9 it's an issue that we got to confront in the northeast.
10 And, frankly, it was a bigger issue with regard to Dean in
11 the northeast than I think it is with regard to DFA. So
12 that's a difference. And not a, not a small one.

13 There are a couple other factors, Your Honor,
14 about the -- I mean I think those factors by themselves I
15 would say are the primary factors. There are a couple other
16 things that are relevant to me and one of them may not
17 differentiate the situation in the southeast, but it was --
18 it was -- it was a factor in our thinking about the
19 settlement.

20 As we -- as we were discussing settlement with
21 Dean there were issues about Dean's financial wherewithal.
22 There were issues to me. And I don't know that all counsel
23 agreed, but there were issues that I was concerned about.
24 There was -- there were trade press reports that listed Dean
25 on the short list of the companies that might not be around

1 in another year. And so there was an issue that if you
2 tried to play out this case for two or three years and took
3 the risk of appeals there might be nothing to collect at the
4 end of the day. So that, that, that was a factor.

5 I think the other factor that was significant,
6 Your Honor, is that one thing the A.G.'s Office letter
7 doesn't point out, and they may have been unaware of it, the
8 Dean settlement, and I applaud the counsel, I mean
9 Baker-Hostetlet has done a great job down there. And they
10 should be congratulated for the settlement. But it's paid
11 out over a four year period.

12 So, you know, what that means in the Southeast is
13 that from the date of filing, which was 1999 or 2007, until
14 the date of the final payment, it's an eight year period
15 for, for payment from the date the case was filed, four
16 years of very intense litigation, and then payments right
17 out, some payments right away. I think it's 60, 20, 20, 20
18 over a four year period is the way I think it works. But
19 there's a time break from day one till the final payment of
20 eight years. You know, in this case, this case has just
21 been on a really different track. I mean you put our feet
22 to the fire on the case. And um, you know, and, you know,
23 I've said this to you before, and I'll just reiterate it,
24 I've never been prouder of the group of colleagues that I've
25 worked -- of the team of colleagues that I've worked with in

1 this case. People have -- I've been in the office all night
2 on several occasions in which case, which I don't know
3 about. Some of my colleagues are more youthful. I feel
4 like I'm getting a little old for that. My kids think I'm
5 too old for it. But, you know, we've been -- we've been in
6 a dead sprint.

7 And the result of that in the case of the Dean
8 settlement is that absent an appeal the payout from this
9 case -- the date -- from the day this case was filed to
10 that, till the payments are made is probably about a two, is
11 about a two year period compared to eight years. And, you
12 know, in a situation, Your Honor, where um, where farmers
13 are experiencing what they are experiencing in Vermont, and
14 a lot of them going out of business, I -- it has always been
15 my view of the case, even someone who loves to try cases, it
16 has always been my view that the best result for farmers in
17 this case is to reach a good settlement. The sooner you
18 reach a good settlement I think it's a better outcome for
19 farmers than letting the process run its course forever up
20 here.

21 I want to be very clear, I mean, in some respects
22 I think one of the strongest indications of how well counsel
23 -- on how well the class is represented here is that, you
24 know, we are absolutely prepared to go to trial in this
25 case. In fact, frankly, at this point, at this point we're

1 basically prepared to go to trial with DFA -- the soonest
2 trial date we can get. And I understand there are other
3 obstacles -- there are other hurdles that have to be
4 crossed. And there's a schedule, a schedule -- but we're at
5 the point where we're going to start pushing for the
6 earliest trial date you'll give us.

7 So, you know, what you've got in terms of
8 representation of this class, and it is relevant to the Dean
9 settlement, is you have counsel that is absolutely prepared
10 to do whatever they need to do to get this case ready to
11 trial and to go to trial against defendants that are -- have
12 vastly greater, vastly greater resources. And you see that
13 in the work that we've done in connection with DFA. We've
14 reviewed millions of documents. We've taken 70 depositions.
15 We just gave them 300 pages of interrogatory responses. Our
16 expert work is on track. I think the expert work is
17 exceptionally good. You know, we are absolutely good to go.
18 But at the same time -- and what that tells Your Honor is
19 that this is not a class that is represented by people that
20 are eager to settle this case at all. It's a class that's
21 represented by people that are absolutely ready to go to
22 trial and firmly believe that DFA has, in fact, violated the
23 law. But that doesn't mean that -- but our responsibility
24 to the class is that if there's an opportunity for a good
25 settlement that's the best resolution of the case.

1 So it's -- at some respects I think if you look at
2 our work in a broader context what you see is class counsel
3 who are prepared to settle the case on reasonable terms, but
4 are also prepared absolutely to go to the distance and have
5 been sprinting for two years to accomplish that.

6 THE COURT: Well, as you know, the case law favors
7 settlement. And we don't expect people to go to trial as a
8 matter of rubato. So I understand your point, but it really
9 isn't an either or situation for the Court. The law favors
10 settled, settlements over litigation. But I take your point
11 to be that if I set you a prompt trial date you would be
12 ready to press the case forward.

13 MR. PIERSON: We absolutely would, Your Honor.
14 And, and the other point I'm making, Your Honor, and it's
15 really not to be an expression of rubato, but I think, you
16 know, the implicit question that the Vermont A.G.'s letter
17 raises, and it's just a question is, you know, do we need to
18 be concerned here that counsel, you know, was in a race to
19 settle the case and settle it for too small amount. I mean
20 that's kind of the implicit underlying -- maybe it is, maybe
21 it isn't. That's kind of how I read it. And that's really
22 the point I'm making is that, you know, this is a situation
23 where you got real litigators who are doing what real
24 litigators do and are absolutely ready to go to trial
25 whenever we can get a trial date. And the settlement with

1 Dean was negotiated in that context by that kind of counsel.
2 We thought it was a good settlement.

3 Today I think it's, you know it's really easy to
4 judge these things for the benefit of hindsight or 20-20
5 vision. It's really easy to attack them. I think it's a
6 great settlement. I think it's a really good settlement.

7 THE COURT: I think you may be reading too much
8 into the letter. We can hear from the Vermont Attorney
9 General as to what was implied. I took that to mean a
10 realistic assessment that a case that settles on the eve of
11 trial is likely to have a higher settlement having crossed
12 the threshold of class certification, motion for summary
13 judgment than a settlement in say three quarters of the way
14 through discovery without having passed through the fire of
15 summary judgment and not knowing what claims are going to
16 make it to trial.

17 So I, I thought that was a realistic assessment
18 that we're talking about apples and oranges in terms of when
19 these cases settled.

20 MR. PIERSON: You know, Your Honor, I think that
21 is exactly right. I mean the reality -- I mean, you know,
22 you've been in the profession for a long time too. The
23 reality there's a premium if you get over all those
24 obstacles and you're on the eve of trial. And that premium
25 can come at a cost, it comes at considerable risk, but there

1 is a premium.

2 But what the Second Circuit has said -- the Second
3 Circuit has said that with regard to class actions the
4 preference is that they settle so you don't actually get all
5 the way down the road. That's the preference. And
6 sometimes it plays out that way. But the preference is to
7 try to reach a negotiated settlement of these things.

8 And so it, you know, implicit in that is, you
9 know, I think is the view that, you know, you can't then say
10 that a case that settles before all those hurdles are
11 crossed, you know, that people should be penalized for that
12 in some way or the settlement should be disparaged or
13 criticized. I mean, you know, it's implicit in saying we
14 hope for the judiciary and the parties that when we settle
15 cases there's a recognition that that means that that
16 premium from surviving all those risks may not be real.
17 It's just a better outcome. I mean that may be another way
18 of sort of stating what the Court's stating.

19 Let me comment a little bit so, on Mr. Gorton's
20 comments. And I don't have a lot to say about him. I mean
21 I think he's, you know, as I've said twice, he's really
22 impressive and he is really impressive. And, you know, I
23 hope if we've convinced the Court of anything in this case
24 is that we're really trying to get this right. And the
25 issues are complicated. We're just working really hard to

1 get it right. And so in that context I'm glad to hear what
2 Mr. Gorton has to say.

3 In terms of his, you know, he kind of makes I
4 guess a couple points um, that I would like to comment on.
5 You know, one point is the notion of sort of long-term
6 relationships and gee is Dean going to retaliate against
7 farmers and lower the price. I guess that may be a fair
8 crystallization of it. And, you know, what I would say
9 about that is that -- I guess I would say a couple things
10 about this. Number one, you know, this is the view of one,
11 of one objector. And, frankly, in terms of -- I want to
12 answer another question Your Honor raised, which is the
13 change in um, in location. And I know what we did in
14 connection with that was that we contacted Mr. Gorton
15 because he was the one -- and I can't tell you whether we,
16 whether we contacted the other objector who just wrote a
17 sentence or two. I just don't know the answer to that. But
18 I do know that I told our co-counsel, and I notice, and
19 Mr. Gorton I hope will correct me if I'm wrong, but I
20 specifically told my colleagues call Mr. Gorton, make sure
21 he understands the hearing's down here because I want to,
22 you know, he was entitled to express his view. And I wanted
23 to make sure that he knew where it was. I also told my
24 colleagues where it was because I also wanted to make sure
25 they would be here.

1 On the merits though he basically says a couple
2 things. Um, one is this concern that, that um, that I guess
3 that Dean will sort of retaliate and lower their prices
4 further because they are going to be unhappy with the
5 farmers. And what I would say about that are a couple of
6 things. Number one, I mean Dean and DFA have been pretty
7 tight in these cases. I mean they are all sitting at the
8 same counsel table. I know this is not a criticism, but
9 there's no indication -- there has been no indication of
10 antagonism resulting from the litigation or their relative
11 postures in all of this case.

12 You know, we have looked at millions of pages of
13 Dean and DFA documents. And whatever they tell you I can
14 represent to the Court there has been no indication of any,
15 anywhere of Dean saying a bunch of these farmers are suing
16 us that's the reason to try to drive the price lower nor
17 have there been any suggestion in any of the DFA documents
18 over the four years of litigation in the southeast or the
19 litigation in the northeast that that is happening.

20 The position they've taken in their documents and
21 in the litigation is, DFA is trying to drive down or that
22 Dean wants to negotiate a low price. And if Mr. Gorton is
23 suggesting that now they are going to be mad and we'll
24 negotiate a lower price I just don't think -- I just don't
25 think the evidence really --

1 THE COURT: I think you may be reading too much
2 into that because I think he said that we have a very
3 complicated issue and the way farmers survive is by over
4 producing and that's not necessarily the way to go and what
5 I need to do is be paid a fair price. And my only regret is
6 the Court has only so much power to affect those kinds of
7 changes. But I didn't actually even hear him object to the
8 amount of the settlement. His criticism was to the amount
9 of the attorney's fees.

10 So I would direct that -- and I actually noted
11 Mr. Gorton to say Dean was a valued customer and no
12 suggestion that he was concerned that Dean would retaliate
13 against.

14 MR. PIERSON: Well, I may not be doing justice to
15 him. I mean he spoke quite a while and he spoke
16 articulately and he expressed some complex ideas. And I
17 don't mean to oversimplify and I certainly didn't mean to
18 inaccurately state it. So, but I would like to address his
19 point about fees because I think it's -- I think it's really
20 a significant one as a matter of public policy. And um, let
21 me say a couple things about that.

22 I mean, number one, I think it is significant that
23 there have been no other objections.

24 THE COURT: But we had a sliding scale.

25 MR. PIERSON: We did have a sliding scale, but the

1 fee petition explained -- the fee petition lays out what the
2 fee, what the fees that we sought are. And there have been
3 no objections to that. That's not an accurate statement.
4 Mr. Gorton has objected to it. But the Attorney Generals
5 haven't. It's an issue I've discussed with the Vermont
6 Attorney General. I've explained our perspective, our
7 perspective on it. And they certainly haven't weighed in
8 against the fees.

9 The Second Circuit law is, I would say, has a
10 vault in a pretty clear direction. And I think it's a
11 sensible direction. And I know how careful Your Honor reads
12 the briefs so I'm not going to belabor that. The Second
13 Circuit has made it I think pretty clear that the percentage
14 method is, it's not the required method, but it's the right
15 method in the Second Circuit. And District Courts have
16 really evolved in that direction, not just in the Second
17 Circuit, but I think -- but I think nationally. And there's
18 some -- and there's some pretty compelling policy reasons
19 for that. And they are explained in the briefs. It
20 probably isn't worth belaboring it.

21 THE COURT: Let me ask you about one thing that
22 I'm thinking about is that 33 and a third is what plaintiffs
23 could expect to recover for attorney's fees should they
24 prevail at trial. And should it be something less than that
25 if the settlement is in, well in advance of trial and before

1 some of those hurdles had crossed and so is there any
2 thought in terms of adjusting it for the stage of the
3 litigation just as we adjust the amount of the settlement
4 for the stage of the litigation?

5 MR. PIERSON: Well, Your Honor, my sense of that
6 is if you looked at it from a market point of view, you
7 know, the typically, you know, boy the contingency fee
8 arrangements, if you looked at it like an individual, and
9 it's not an unfair way to look at it, and, in fact, there's
10 some support in the Second Circuit that you really -- to
11 view it this way the way the market would deal with
12 contingency fee cases. But, you know, in a contingency fee
13 case I think of this complexity in an antitrust case, you
14 know, it would be a very normal contingency fee arrangement
15 to provide for, you know, probably a 30 percent fee, plus
16 expenses at the outset, you know, and maybe if the case was
17 resolved in a month or two. But for a case that really got
18 litigated and the percentage, you know, if to the extent --
19 I mean often, you know, many of the contingency fee
20 arrangements I've seen don't differentiate for the situation
21 whether a case goes to trial or if it doesn't.

22 THE COURT: Some of them do.

23 MR. PIERSON: Some of them absolutely do. But,
24 but I can tell you as someone, you know, who has now been
25 doing this long enough and has seen it from the other side

1 there is no possibility in the market that, that plaintiff's
2 attorneys would take this case on without an agreement that
3 if you were going to litigate this case as hard as we've
4 litigated it, we've invested \$13 million of time and fees in
5 the case so far, and it continues to accumulate. And um,
6 nobody in the marketplace would take that case on without
7 being assured of a return of at least 30 percent regardless
8 of whether it went to trial; 30 percent plus fees.

9 And, and that's not just my speculation, Your
10 Honor. There is evidence of that. I mean, I think, you
11 know, one of the important ways to view our work is, you
12 know, Your Honor alludes to the statute of limitations issue
13 and certainly some of the conduct we've been challenging has
14 been going on for a while.

15 You know, there are no individuals who have been
16 able to pursue these claims on an individual basis. There
17 are no other class action lawyers that stepped up. There
18 are no law enforcement agencies that were prepared to take
19 this on. And, frankly, most law enforcement agencies,
20 particularly State A.G.'s Offices don't nearly have the
21 resources to take them on.

22 So at one level, Your Honor, with regard to these
23 claims, you know, the market has sort of spoken. No one
24 else was prepared to do this, Your Honor. And, and, and,
25 frankly, Your Honor, it's a case that absolutely should have

1 been brought.

2 And I, I mean you've seen a lot of evidence now
3 and this is not the time or place to speak of it. The
4 evidence is compelling. It is a case that should have been
5 brought. And the private market was not bringing it. And
6 I, you know, I think -- so there are a couple of points in
7 connection with that that I would like to make about fees.

8 First, I think it is important -- so in terms of
9 the percentage method, you know, there is a great deal of
10 case law, and I'm not suggesting it's every case, but there
11 are many cases within the Second Circuit that have said
12 30 percent, 33 and a third percent and expenses is
13 reasonable. One case describes it as eminently reasonable.
14 I think we cite nine or 10 cases for that proposition. And,
15 again, I'm not claiming that it's universal, but there is
16 ample support for that proposition.

17 Secondly, what the cases say -- the way load star
18 is primarily used now, Your Honor, as you know, this is a
19 check, this is a double check to make sure it's not out of
20 proportion. I mean here, you know, if the load star tells
21 you anything it tells you that we're stupid. I mean in the
22 sense that, you know, I mean our load star exceeds,
23 substantially exceeds the fee that we're requesting. So,
24 you know, not only does it -- does it not reflect a risk
25 premium in the case where the risks and burdens are

1 enormous, you know, we're not even -- we're seeking an
2 amount that's below our load star.

3 The other obser -- I guess there are two other
4 observations I would like to make about the fees, Your
5 Honor. One is that, you know, I can tell you as an officer
6 of the Court and as somebody who has been doing this for a
7 long, long time on, on both sides of the equation, while the
8 fee may seem like a lot, and it is a lot, given the
9 complexity of this litigation, this case has actually been
10 done in an extremely efficient way. I mean it's just, this
11 is what it takes to litigate a case like this.

12 My view as a litigator, and it was, you know, my
13 partners used to get mad at me about this when I was at a
14 big firm, I'd do big leverage cases and get big staffs
15 together. I've always believed cases are most effectively
16 litigated with the smallest team you can bring that's
17 consistent with getting the work done. And that's what
18 we've tried to do here.

19 So Your Honor gave us directions I think about a
20 year ago, which was, you know, you basically -- you didn't
21 want more than two people showing up at depositions. I
22 think that was one. There were a number of ground rules.
23 And I will tell you Your Honor -- I mean I took about 10
24 depositions in this case in the last couple of months. And
25 I mean it was almost a full-time job. There were a lot of

1 senior witnesses. It was more than a full-time job. You
2 know, rarely was there a second attorney there on our side.
3 Never was there a paralegal there. You know, I went out
4 there and did them alone, carried my own boxes and did what
5 a real litigator ought to do. And that is what everyone on
6 our team did. That's what Mr. Manitsky did. So not only
7 did we not overstaff it in the way Your Honor was
8 legitimately concerned about, we were erring in the other
9 direction. And there was a compelling reason for that.
10 There was a lot of work to be done and a limited amount of
11 bodies to do it.

12 The other observation I want to make about this,
13 Your Honor, and I really think this is fundamental and um,
14 this is really a benefit, I think in my perspective from
15 being on the other side of these cases, you know, I can
16 virtually guarantee you that -- in fact, there's no doubt in
17 my mind that whatever resources we've devoted to prosecuting
18 these cases the other side has devoted significantly more.
19 Where we bring one attorney they bring two attorneys, they
20 bring three attorneys.

21 Where we carved out the Dean preliminary
22 settlement there are, you know, there's the counsel for DFA,
23 there are three other lawyer firms DFA has paid for.
24 There's a huge dissimilarity in resources. And that's fine.
25 I'm not criticizing the defendants for that. I did the same

1 thing when I was on the defense side. But it has a real
2 implication, Your Honor, which is these cases cannot be
3 brought and litigated successfully if plaintiff's counsel
4 has to tie their hands behind their back. You know, if, if,
5 if the way the system worked was that they can devote
6 enormous financial resources to expert work and bringing
7 attorneys etcetera, etcetera, and we have to devote one
8 sixth of the resources of that the cases can't be won.

9 So, you know, what we've done, Your Honor, and I
10 say this as someone whose been doing it a long, long time,
11 is we've tried to litigate the case really, really
12 efficiently, but we've also tried to litigate it extremely
13 well and not get crushed by the other side's resources.

14 Your Honor, our fee petition is an expression of
15 that, Your Honor. That's, I mean, it's simply what it
16 takes, Your Honor. And if we want cases like this to be
17 brought, if we want firms to be able to bring cases like
18 this the attorneys have to be able to litigate it with some
19 level of comparable resources to the resources the
20 defendants bring to the table and the defendants have to be
21 compensated for that -- the plaintiffs to have compensated
22 for that.

23 And, you know, at one level, I mean, you know, I'm
24 very sympathetic and supportive of these farmers. And, you
25 know, it's, it's simply a practical necessity that attorneys

1 get well compensated for their work in a case like this.

2 And I think, you know, and so I think the short
3 order is the case has been litigated really efficiently,
4 people have been working really, really hard in a dedicated
5 way. This is what, just what it costs. I think more
6 resources have been expended on the other side. The fee
7 requests we're making is consistent with Second Circuit law
8 and it really rewards nothing for risk in a case where the
9 risk was very high. And that's -- I'm not complaining about
10 that. That's just the way it is. But I think, Your Honor,
11 that the fee request is eminently releasable and is really,
12 you know, if we can't fully compensate attorneys for doing
13 this kind of work these cases won't be brought. And that,
14 that would really undermine a strong policy in the Second
15 Circuit and elsewhere for private enforcement of the
16 antitrust laws.

17 THE COURT: What about the incentive fees for
18 class representatives?

19 MR. PIERSON: You know, I want to check on that.
20 Can I just ask my co-counsel? I asked him to check on that.

21 THE COURT: Sure.

22 MR. PIERSON: Yeah, Your Honor, what the answer to
23 is that um, on the website -- so what the notice -- and I
24 can -- I'm kind of doing this from the advice I've gotten
25 and my understanding. So if I've got it wrong I'll correct

1 it later. But here is what my understanding is, the notice
2 tells everybody in the class that they can get -- to get
3 information about the case when it's posted on the website.
4 It's on the claims administrator's website. So on the
5 claims administrator's website we posted the fee petition
6 including the request for the incentive fees.

7 The request for incentive fees is quite standard.
8 You know, I would say neither high nor low. It's just it is
9 what it is. But all of that information is posted on the
10 website. None of the Attorney Generals have objected to the
11 incentive fee or the fee request. And none of -- and
12 there's been -- there's been the one objection from
13 Mr. Gorton. Does that answer?

14 THE COURT: Well, my question was prefaced by
15 didn't come at preliminary approval, the Court did not pass
16 on it. My concern is how can you object to something that
17 you don't know about? You've said, well, it's on the
18 website. One of the reasons why I got involved in what the
19 notice should say is I found some ambiguities. I thought
20 the class should know that it wasn't a lock, that it was
21 going to be 33 and a third, that they should be able to
22 evaluate the range and understand it was the Court's
23 responsibility. I don't recall even addressing the issue of
24 incentive fees.

25 MR. PIERSON: I mean that's a fair question, Your

1 Honor. And, and it is a fair question. And I -- I'll, you
2 know, the Court will have to, you know, the Court will
3 obviously make a decision, but all I can tell you is that it
4 is -- that it's standard. I mean it's well within the norm.
5 And, you know, frankly, in a case where, you know, there's
6 an argument for a higher incentive fee, there's a real
7 argument. In the Southeast -- in the Southeast I believe
8 the preliminary approval I think it's a \$10,000 incentive
9 fee.

10 And, you know, it's a really reasonable request,
11 particularly in a case like this where, you know, these guys
12 stepped up and um, you know, took a risk in, you know, in
13 suing what is a major portion of the market. I mean you
14 want to talk about fear of retaliation or fear of the
15 concerns for their livelihood. These guys really took a
16 risk. So I think, you know, it's quite -- it's quite a
17 standard and justified request. It is on the website. I
18 understand the Court's point, but I do think that the
19 information is out there. And I just think it's fully
20 appropriate in this case.

21 And in terms of, you know, what we're talking
22 about here, you know, it's, you know, a very modest amount
23 in terms of -- in terms of the amount at issue.

24 THE COURT: All right. And I believe your client
25 wanted to speak?

1 MR. PIERSON: Can I just speak with them for a
2 moment?

3 THE COURT: Yes.

4 MR. PIERSON: Your Honor, can we have a brief
5 recess?

6 THE COURT: Pardon me?

7 MR. PIERSON: With your indulgence can we ask for
8 a brief recess?

9 THE COURT: Sure. We will take, it's about time
10 for our mid-morning recess anyway. We'll take approximately
11 10 minutes. You have all day, but at 11:45 we are going to
12 exceed the courtroom to Judge Hall who is going to use it
13 for ceremonial purposes over the noon hour. If you need
14 time in the afternoon we'll have it as well.

15 MR. PIERSON: Thank you, Your Honor.

16 (The Court recessed at 10:40 a.m. and resumed at
17 10:50 a.m.)

18 THE COURT: We're back on the record in Allen et
19 al versus Dairy Farmers of America, Inc., et al. And, Mr.
20 Pierson, we were in your presentation.

21 MR. PIERSON: And I appreciate your indulgence,
22 Your Honor. And there are a couple things I want to share
23 with you. And I'll try to be as quick as I can.

24 The most fundamental one is this, is that the
25 clients are really not in it for the money. I mean they --

1 the damages are real and they think people should be
2 compensated but, but what they -- the reason they stepped up
3 and participated in this lawsuit was out of real concern for
4 what's happening with competition in this industry and
5 practices that they regard as illegal and we regard as
6 illegal.

7 And, you know, what they hope to see in the -- at
8 the end of the day in the litigation, and as we go forward
9 against DFA, they really want changes in the industry that
10 will improve the situation for everybody and help farmers
11 get a fair deal and help farmers stay in business and help
12 farmers get the benefit of fair competition. And that is
13 extremely important to them. And that's what we'll be
14 pursuing in terms of injunctive relief against DFA. And
15 we're committed to doing that.

16 The other thing that I know from talking with them
17 that I wanted to reiterate to the Court, it's something
18 we've spoken about before, but it's also really important to
19 them, is one of their goals in this litigation is to shed
20 light on what's been going on in the northeast. And so a
21 frustration that, a frustration that they've had, and it's
22 an issue we've discussed before, is the volume of stuff that
23 is under seal and how hard it is to sort of get all the
24 stuff out to light.

25 And what, what I've communicated and committed to

1 them is that, you know -- and I think the Court has some
2 sense of this, is that we're working pretty hard to try to
3 get -- I mean there's some stuff, and we talked about it
4 before, pricing information in the last year or two that
5 stays under seal until the case goes to trial.

6 But, but our view is that the overwhelming
7 majority of facts in this case should be part of the public
8 record and should be brought to light. The Vermont Attorney
9 General has started to post some of this on the website,
10 but, but, you know, there's a lot of talk in this case about
11 farmers versus farmers. And I think, you know, the starting
12 point, from our perspective, and I think the clients agree
13 with this, is, is let people find out what the real facts
14 are and then you may see a lot less division than is
15 professed by the defendants.

16 So I just -- I hope I've communicated what you
17 wanted me to communicate. But the point is they want to see
18 the industry change in a way that's better for everyone.
19 That's extremely important for them. They want the real
20 facts to come out. And we're going to do what we need to do
21 in this case to make sure that happens.

22 THE COURT: Did you want to say something
23 yourselves? You are free to do so.

24 PLAINTIFF: No, Your Honor. Counsel said it.
25 Thank you.

1 THE COURT: How about you, sir? Are you together
2 then? Yes. Yes, okay. And neither of you want to say
3 anything. You don't have to. I just wanted to make sure
4 you have an opportunity if you want to. I know Mr. Gorton
5 would like to respond to counsel's remarks after they've
6 been concluded. And I think that's fine as well. That's
7 what we're doing in a fairness hearing.

8 Let's turn to you Mr. Friedman.

9 MR. FRIEDMAN: Thank you, Your Honor. Hopefully I
10 can be reasonably brief. I want to first comment on
11 Mr. Gortman's remarks and what I understood him to be
12 saying. And during the break I did have an opportunity to
13 chat with him briefly as well. And I think, first of all,
14 he is a very eloquent and passionate person about his
15 concerns about the dairy industry.

16 The fundamental take away that I understood from
17 him is that the mechanism for determining, discovering,
18 establishing prices for raw milk in the dairy industry isn't
19 working. Fundamentally, however, that pricing mechanism is
20 a creature of federal regulation because 90 percent of the
21 pricing is established every month by the United States
22 Department of Agriculture using national metrics that
23 Mr. Gortman believes, I think, don't set an appropriate fair
24 proxy, don't have any real relationship to cost or market
25 prices.

1 THE COURT: I think you've accurately summarized
2 what I took him to be saying. My regret is over promising
3 what the Court can do because it -- not all of this is
4 within the Court's power.

5 MR. FRIEDMAN: And, and I think that's exactly
6 right, Your Honor. Litigation is a relatively blunt
7 instrument when it comes to addressing policy issues such as
8 those expressed by Mr. Gortman. So I think that's where we
9 find ourselves with respect to his valid concerns.

10 Let me speak to the settlement and the fairness of
11 the settlement itself. And I think it is important to
12 underscore that the issue before the Court is whether this
13 settlement is fair and reasonable to the class.

14 And I will tell you that from my perspective and
15 my client's perspective it's a lot of money. And it is a
16 lot of money particularly in a case where Dean Foods
17 continues to maintain that it has not violated the law. And
18 there's no admission of liability here. There's no
19 admission of liability in the Tennessee settlement. And I
20 will talk about the differences between the two cases in a
21 moment.

22 One of the things that I think bears highlighting
23 in terms of the Court's assessment of the fairness of this
24 resolution is in the plaintiff's memorandum in support at
25 Page 11. And they note that the 30 million dollar payment

1 equals about 20 percent of the total amount of over order
2 premiums that Dean paid to the settlement class during the
3 class period. By any measure -- and that over order premium
4 is the only portion of the price that is set by the parties
5 in this lawsuit.

6 So, a 20 percent recovery in effect is a
7 sur-charge that Dean is being assessed or a tax that Dean is
8 being assessed on the prices that it paid to class members
9 for the milk that it bought over the course of the class
10 dispute. That's a very substantial recovery by class action
11 standards, by antitrust jurisprudence standards. And the
12 plaintiffs have cited a number of cases talking about
13 recoveries that are much, much smaller. So if we just take
14 an objective examination of what's the recovery here as a
15 percentage of the prices that were paid it's substantial.

16 With respect to what went into the settlement, and
17 it certainly is correct that there was an arm's length
18 negotiation between the parties and both parties were fully
19 informed. To be sure I started at a much lower number than
20 we ended up. And they demanded a higher number than we
21 ended up. And that's the nature of compromise.

22 In terms of where this case was, discovery of Dean
23 in depositions in this case had not been taken when we
24 settled. But, as Your Honor knows, extensive deposition
25 discovery of Dean had been taken in the Tennessee

1 litigation, all of which was available to the lawyers in
2 this case.

3 So the negotiations occurred in the context I
4 think of a fully revealed record. Since the settlement
5 there were only four additional depositions of Dean, current
6 or former Dean employees, taken. And those, I think it's
7 fair to say, didn't add or subtract to the knowledge that
8 informed the decision to settle.

9 THE COURT: And nothing about the settlement
10 precluded them from taking more should they have decided it
11 was necessary?

12 MR. FRIEDMAN: Well, we, we had agreed that we,
13 that they could take -- they would treat us as a third party
14 to take up to four.

15 THE COURT: Right.

16 MR. FRIEDMAN: I don't think they would have been
17 permitted to take more than four depositions.

18 It is, it is the case that the statute of
19 limitations issue in my mind played a significant role in
20 valuing the case. And it was a point of disagreement,
21 frankly, between counsel as we negotiated it. But I can
22 tell you quite frankly that my position was if you try this
23 case against us you're going to get damages for four years,
24 period, full stop. It's not going to go back beyond four
25 years from when the complaint was filed. And they take a

1 different view, but in terms of looking at the risk in the
2 case that was very clearly our position.

3 In contrast -- and the reason for that is, and you
4 may remember, in their complaint there are no acts in
5 furtherance of the conspiracy that are identified committed
6 by my client that occurred within four years of the
7 limitations period. So if they wanted to take advantage of
8 fraudulent concealment and continuing conspiracy theory they
9 needed to have identified something like that.

10 So our position, as part of negotiation, as part
11 of an evaluation of the case was it was a four year damage
12 period was our risk. All right. So that's one point.

13 The second point is that this is a case that came
14 to a settlement negotiation and a conclusion with a fully
15 formed or almost fully formed record from, from my client's
16 perspective. And so we knew, and the plaintiffs knew, that
17 the fundamental theory in the case, and it's in their
18 interrogatory answers, their theory is that a conspiracy was
19 hatched in 1998. That's their theory. We disagree. We
20 don't think they can prove it, but that's their theory.

21 And what their expert Gordon Rausser said, and
22 he's their expert in Tennessee, and he's their expert here,
23 he said the conspiracy was formed in 1998, but it couldn't
24 be implemented until the end of 2001 when Suiza and Dean
25 merged. Rausser says that's the overt act that enabled the

1 parties to engage in any competitive behavior. Again, we
2 don't agree with that, but that's his position.

3 Well what's significant about that in terms of
4 evaluating the exposure in this case is that the merger
5 between Suiza and Dean had virtually no impact in order
6 one. And the reason I say that is this, Legacy Dean, which
7 was a party to the merger, had one plant in order one.
8 That's it. So Suiza and Dean didn't increase their
9 concentration in order one by reason of the merger.

10 Second point is what Professor Rausser says
11 happened as a result of the merger is the merged entity
12 divested 11 plants throughout the United States to this
13 newly formed entity, NDH, National Dairy. None of the
14 divestiture plants was in order one, not one of them. Most
15 of them were in the southeast, not all of them, but most of
16 them.

17 And according to the plaintiffs the divested
18 plants in the hands of NDH really operated as a tool, a
19 puppet, an entity under the control of DFA. And so the
20 theory, according to Rausser and the plaintiffs in the
21 southeast is that DFA controlled the processing plants that
22 NDH owned and had a full supply agreement with Dean for its
23 processing plants. And so the combination of those gave the
24 so-called conspiracy control of 70 to 80 percent of bottling
25 plant demand.

1 It wasn't all in Dean's hands. The experts, the
2 plaintiff's experts say Dean, after the merger, had about,
3 somewhere between 40 and 43 percent of the class one
4 bottling capacity.

5 So let's compare that to what we have here. You
6 heard Your Honor I think in April Mr. Pierson acknowledged
7 that when they alleged Dean's market share in order one in
8 their complaint they were off a bit and their best estimate
9 now is somewhere in the mid 20 percent share.

10 Okay. Now, what about the rest of the processing
11 world? Well, NDH is not a factor in the northeast. It's
12 essentially not present as a processor. Hood has the second
13 largest share. And it, just making sure my phone was off,
14 Your Honor. I heard a ring in the background.

15 Your Honor dismissed Hood on the motion to dismiss
16 because the plaintiffs were not able to allege facts
17 sufficient to withstand a 12 (B) 6 standard. So there's
18 really, from my perspective, evaluating the risk, no
19 evidence of a processor conspiracy that is wrapping up
20 control or access to processing plants in order one. It
21 makes a huge difference in terms of our assessment of the
22 risk, likelihood of plaintiff's success, likelihood of a bad
23 outcome. So those, those facts make a huge difference in
24 our assessment.

25 And then let me just turn to the procedural

1 posture of the case because clearly it makes, it makes a big
2 difference. And I will preface what I'm about to say, I'll
3 say it once so I don't have to keep repeating it. Judge
4 Grear in Tennessee has made a substantial number of rulings
5 and moved the case forward. And we disagree with many of
6 his rulings, but they are the rulings of the Court. And
7 they put us in the posture we found ourselves last week.

8 So the hurdles that the plaintiffs in Tennessee
9 passed, that have not been even crossed yet by the
10 plaintiffs here, include class certification. And in
11 Tennessee we petitioned for interlocutory appeal. The Sixth
12 Circuit turned it down so they survived that. There are two
13 pending motions to decertify the class. The Court hasn't
14 ruled on those yet. Motions for Summary Judgment briefed,
15 argued, decided. Three counts were dismissed, from my
16 perspective that was great, but two counts survived. And
17 those two counts, conspiracy in restraint of trade under
18 Section 1 and conspiracy to monopolize in violation of
19 Section 2, frankly, are sufficiently large to encompass
20 everything that the plaintiffs in Tennessee were complaining
21 about.

22 There were 70, don't blanch, but 70 motions in
23 limine that were filed. The Court held argument on those
24 over the course of two days and delivered oral rulings on
25 many of them. So we knew -- the, the written rulings were

1 still coming out. But we knew that the case was going to
2 survive with some whittling back, but largely in tact.

3 So we reached an agreement with the plaintiffs in
4 Tennessee days before the final pre-trial conference knowing
5 that they had survived all of the milestones and it was a
6 virtual certainty that if we didn't resolve the case it was
7 going to go to the jury with a very large damage number with
8 substantial risk and exposure. And under those
9 circumstances were the plaintiffs able to extract from us a
10 larger settlement? Yes, they were. It is the nature of
11 litigation.

12 So we have a situation where the risk profile of
13 this case to my client is much lower than the risk profile
14 of the Tennessee case. And procedurally the plaintiffs had,
15 had crossed every milestone short of going to a jury and
16 hear all of those milestones lay before them.

17 So given that I think that really addresses the
18 question that I took the Attorney General to be asking,
19 which is we think \$30 million seems like a fair and
20 reasonable settlement, but we understand that there's a
21 larger settlement in Tennessee and we'd like somebody to
22 explain whether that causes anybody to question whether the
23 settlement in the northeast litigation is fair. So
24 hopefully I've answered that. If Your Honor has questions
25 I'm happy to take them.

1 THE COURT: No. You have addressed it. Thank
2 you.

3 MR. FRIEDMAN: Thank you, Your Honor.

4 THE COURT: And Mr. Gorton did you want to say
5 something further? You may do so. And then we'll let Mr.
6 Pierson as the moving party have the last word.

7 MR. GORTON: Thank you, Your Honor, for the
8 opportunity to speak again. I would like to address two or
9 three things that were said. First off, I would like to
10 confirm that Mr. Brown did, in fact, contact me and make
11 sure that I knew that the venue had changed. And in all of
12 our discussions Mr. Brown clearly was trying to understand
13 my position and my perspective of things. He was clearly
14 trying to articulate his perspective. And he obviously was
15 trying to convince me of his perspective, but he made it
16 very clear that in no way, shape or manner was he trying to
17 prevent me or was he even encouraging me not to present my
18 perspective. And I appreciate that very much. And I
19 enjoyed very much the conversations with him.

20 A couple of other things that I would like to
21 address. First, the issue of representation. I'm up here
22 as a single voice. To be very honest with you when I talked
23 to Mr. Brown, Mr. Brown actually initiated contact. He
24 called me when he got my letter. And when I asked him and
25 he told me that I was the only farmer who requested to speak

1 that was sort of a combination of scaring, daunting. And I
2 was, I was -- in some ways I was disappointed. I really
3 thought that maybe more farmers would be interested and
4 willing to share their thoughts.

5 I think one, one big issue here is this is the
6 busiest time of year for dairy farmers. And um, I think a
7 lot of farmers, number one, didn't have the time and, number
8 two, wouldn't necessarily be comfortable, while they might
9 be happy to discuss this issue at a dairy farmer meeting or
10 among friends and family, would feel very uncomfortable
11 standing up here at this podium and speaking. And I am not.
12 I give technical presentations at engineering symposiums
13 national and international.

14 I would like to address a couple other things. As
15 these lawyers said the federal -- there's this issue with
16 the federal minimum price. And unfortunately, particularly
17 for class one milk, the federal minimum price, in fact,
18 bears no relationship whatsoever to what Dean Foods can sell
19 milk for and it has no relationship whatsoever to what dairy
20 farmers can produce milk for.

21 So as an indicator of what the price of milk,
22 particularly fluid milk, should be, it is like totally
23 worthless to all of us. And that is in good part, you know,
24 what caused the problem. And we recognize that you as the
25 Court can't change that. But that -- and I say that because

1 that's the exact emphasis of the issue of long-term
2 relationship.

3 I already, I already have convinced Dean Foods to
4 pay me an over order premium. They pay me more than they
5 absolutely have to pay me already. And any change in that
6 negotiation position, which could be imperceptible, I
7 absolutely agree, you know, I'd have no thought whatsoever
8 that Dean Foods is going to stand up tomorrow and say you
9 dairy farmers sued me so you are not going to get an over
10 order premium. They are not going to say that, absolutely
11 not. They need us. We need them.

12 But, once again, my expertise in control and
13 monitoring, for example, if you have a thermometer that can
14 measure plus or minus five degrees you can't detect a change
15 of a tenth of a degree. And a change in negotiating
16 position that would be imperceptible even to the Dean Foods
17 people and the DFA people who are negotiating, could more
18 than offset the benefit of this settlement. And for me
19 personally my share of the settlement will not even, will
20 not even compensate me for the amount of time I have spent.
21 I attended the preliminary hearing. I wrote a letter. I
22 wrote this letter. I have thought long and hard about what
23 to say at this meeting. Several times this week my wife has
24 taken her to do list and said, John, why are you doing this?
25 And I said, well, honey, I think it's important to my

1 industry so I'm doing it.

2 And then I would like to address the issue of
3 representation of, representation of farmers. So I haven't
4 had any opportunity, due to time and resources, to do any
5 kind of like survey or anything that I could claim that has
6 any illegitimacy. I have spoken to lots of dairy farmers.
7 I would like to say two things.

8 First off, I believe in my heart that my position
9 represents somewhere between a majority and a vast majority
10 of dairy farmers in the northeast. And the other thing I
11 will say that for the dairy farmers who support the idea of
12 competition, and that would be my last remark, talk about
13 competition, those who support that concept, the concept
14 that this lawsuit is promoting when that drives the price of
15 milk below cost of production, like it did in 2009, 2006 and
16 several other times, those farmers are the first farmers to
17 cry and shout the loudest and hardest that this system needs
18 to be changed. And the reason for that is that competition
19 as the single driving force is in itself destructive. I
20 already talked about in order to really satisfy things,
21 dairy farmers, our industry needs to over produce. When we
22 over produce that competition forces our price down.

23 And the competition -- and even if it's the other
24 way, if something happens and milk turns short, competition
25 forces the price up. That's good for dairy farmers, but it

1 forces the price up, as it did in 2008, to a price that's
2 not sustainable for them. That doesn't do me any good and
3 it doesn't do them any good.

4 Just as in 2009 when it forced the price down to a
5 level that was unsustainable for dairy farmers, yeah,
6 instantly it was great for Dean Foods, but it's not in the
7 long-term interest to either of us.

8 And the problem with competition is that
9 competition in and of itself is a root, is a ruthless and
10 relentless driver that moves prices one way or the other
11 without regard to what is right. If there's a little bit of
12 over supply it pushes prices up indiscriminate of what
13 really should happen. If there's a little bit too much milk
14 it pushes prices down indiscriminate of what prices should
15 be. And that is the reason -- those are the reasons that I
16 have the concerns that I have is that, once again, this
17 lawsuit, this settlement does not help me in any way, shape
18 or form to solve the real problems in my industry.

19 We've already heard, we've spent almost
20 \$20 million in legal fees to get \$30 million.

21 I'd also like to just mention Russ Consulting.
22 When I got notice I had a lot of questions. I called Russ
23 Consulting. I got several wrong answers. I got several
24 nonanswers. I discussed that issue with Mr. Brown at
25 length. Basically if Russ Consulting were working for me on

1 one of my defense contracts as a program manager I would
2 have fired them.

3 THE COURT: All right. Thank you. Mr. Pierson?

4 MR. PIERSON: Your Honor, I think I can be very
5 brief. Again, I appreciate Mr. Gorton's remarks, but I do
6 want to comment on, on one thing he said, which is, and it's
7 really to reiterate the client's point about the importance
8 of changes in behavior.

9 Mr. Gorton, I think his words were basically
10 competition is disruptive. And, of course, he's entitled to
11 his opinion. But DFA's antitrust complaint guidelines say
12 they will compete fairly and prescribe certain activities,
13 many activities that they say they will not do because they
14 are strictly prohibited. And it's a black list of
15 activities.

16 And the record in this case I think overwhelmingly
17 shows that, in fact, that's exactly what DFA has been doing.
18 DFA is subject to a consent decree with the United States
19 Department of Justice in which it has both agreed and is
20 required to compete fairly. We're going to hold them to
21 that standard. It's a standard they've imposed for
22 themselves. And we are going to seek relief in this case
23 from that defendant to achieve those goals.

24 THE COURT: Thank you. All right. I will take
25 this matter under advisement. I am setting myself a

1 deadline of approximately 30 days. The Court sets its own
2 deadlines. It also has the power to modify them. But I'm
3 going to try to get you a prompt response.

4 I want to talk to counsel for all defendants,
5 except for Dean now, about the motion for class
6 certification and rescheduling it. And my, my first remark
7 is I agree that I set you a, I'll call it ambitious, and you
8 might call it something else, discovery schedule in this
9 case. And for the most part all deadlines have been met.
10 If you need to extend a deadline you worked together and
11 modified it.

12 There's been very limited judicial intervention in
13 the case. I told you I would not let this become the most
14 expensive case in the District of Vermont's history. It has
15 not been from my perspective. And it's been well managed.
16 Something has happened with the class certification where
17 people are filing 273 page exhibits to this Friday
18 afternoon. Another one is pending approval now. You
19 should -- it's always good to think of the decision maker in
20 what is that decision maker going to be able to digest and
21 pursue. And nothing merits that kind of paper.

22 If you cannot present what you need me to know in
23 a succinct fashion then maybe it needs to go back to the
24 drawing board. It's literally stacks and stacks of paper.
25 And you know my practice is to read every single thing you

1 submit. But particularly lately it hasn't been a realistic
2 view of what the judge is going to be reading Sunday night.

3 So I want you to be cautious about that because I
4 want to give everything that you file my complete attention
5 and if you are being overly inconclusive and repetitive
6 that's not going to accomplish that.

7 Counsel has proposed certain dates for the hearing
8 in rescheduling the hearing in this case. Unfortunately the
9 Court is going through its final renovations at that point
10 in time. I know counsel has a trial coming up in the
11 Southeast milk case. A couple thoughts as to how to handle
12 this. We could do it on the papers. And there certainly is
13 a lot of them. We could reschedule the hearing and try to
14 give you some dates in late July, knowing that everybody's
15 probably got the summer booked, or we can do it after your
16 trial. And I don't know when that's expected to end, but I
17 think you chose some August, perhaps 8th and 9th were days
18 that everybody was available. It did not really appear to
19 work. So let's hear, let's hear first from DFA and DMS
20 because we've made them stay silent during the case.

21 MR. SARTORE: Your Honor, may my group be excused?

22 THE COURT: Sure.

23 MR. SARTORE: Thank you.

24 MR. HARDY: Good morning, Your Honor. Kevin Hardy
25 on behalf of DFA and DMS. And I do just want to start by

1 thanking counsel for the plaintiffs and the Court. I know I
2 speak on behalf of Mr. Kuney, we very much regret and
3 understand the inconvenience and appreciates everyone's
4 consideration.

5 THE COURT: We just hope he's well.

6 MR. HARDY: With respect to scheduling I have a
7 couple thoughts. The Court in Tennessee has advised the
8 parties that in light of its criminal docket
9 responsibilities it won't be -- we won't be in trial on
10 Mondays in that case. So one possibility is to schedule it
11 for a Monday.

12 Another possibility is that Judge Grear in
13 Tennessee has indicated that for him the week of August 29th
14 he has his own scheduling issues that week. So that might
15 actually -- I don't know -- I haven't -- I don't know what
16 plaintiff's counsel's availability is then, but I know he is
17 not available at the end of July.

18 MR. PIERSON: Any of that is fine with us.

19 MR. HARDY: So that would avoid a Monday hearing
20 which has some travel logistics, but that might be one
21 candidate option. If we push it to the end of the Southeast
22 trial I regret, I think that ends up being late October,
23 which is a pretty lengthy, lengthy delay. So perhaps a
24 Monday or the week of the 29th if that would work with the
25 Court's schedule.

1 THE COURT: Does that work with you as well,
2 Mr. Pierson?

3 MR. PIERSON: It does. July really doesn't look
4 good for me, Your Honor. I apologize for that. But pretty
5 much any time in August that's convenient for them and I'll
6 make myself available.

7 THE COURT: Well, my judicial assistant will work
8 with the two of you, we will get a date and we will reset it
9 promptly. And that gives us enough time to work with. I
10 don't see why we shouldn't be able to do it.

11 MR. PIERSON: If I could make one other comment,
12 Your Honor, I don't think we would be opposed to having it
13 decided on the papers either.

14 THE COURT: All right. Well, you can talk between
15 the two of you if that's what you want to do. My practice
16 is if a party asks for oral argument we generally grant that
17 request. But I offered that as a possibility because
18 certainly it has been well briefed.

19 MR. PIERSON: We'll certainly discuss that.

20 THE COURT: Anything further on this matter?

21 MR. FRIEDMAN: Nothing from us, Your Honor.

22 MR. PIERSON: No, Your Honor.

23 THE COURT: Thank you.

24 MR. PIERSON: Thank you.

25 (The Court recessed at 1125 a.m.)

C E R T I F I C A T E

I, certify that the foregoing is a correct transcript, to the best of my ability, of the record of proceedings in the above entitled matter dated July 18, 2011.

A handwritten signature in cursive script that reads "Anne Marie Henry". The signature is written in black ink and is positioned above a horizontal line.

Anne Marie Henry, RPR
Official Court Reporter